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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANCISCO JAVIER MARES,

Defendant.

Case No. 2:20-CR-00018-JCM-EJY-2

**REPLY TO MOTION TO EXTEND
SELF-SURRENDER DATE/BAIL
PENDING APPEAL/STAY
EXECUTION OF SENTENCE**

I. The Breach and Mandatory Reversal

Mr. Mares's case clearly involves "exceptional circumstances" including raising a substantial claim upon which he has a high probability of success. Rather, "automatic reversal is warranted when objection to the Government's breach of a plea agreement has been preserved." *Puckett v. United States*, 556 U.S. 129, 141 (2009). Furthermore, "case law requires" that any further proceedings occur before a different judge, even if we have no doubt that the first district judge treated the defendant fairly and impartially. *United States v. Alcala-Sanchez*, 666 F.3d 571, 577 n.2 (9th Cir. 2012) (quoting *United States v. Johnson*, 187

1 F.3d 1129, 1136 n.7 (9th Cir. 1999)); *accord Whitney*, 673 F.3d at 968 n.1. Once the district
2 judge has seen or heard the offending words that denied the defendant the benefit of his
3 bargain, any further proceedings before him would necessarily be tainted by the
4 government's breach. *United States v. Morales Heredia*, 768 F.3d 1220, 1236 (9th Cir. 2014).
5 The only way to undo the damage is to reassign the case. *Id.*
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7 Once the prosecution has forcefully argued for a sentence other than the stipulated one
8 and has denied the defendant a united front, here by retracting its recommendation for three
9 points of acceptance of responsibility and making negative comments about Mr. Mares, "one
10 really cannot calculate how the government's error and breach may have affected the
11 perceptions of the sentencing judge." *Alcala-Sanchez*, 666 F.3d at 577. That the district
12 court claimed not to have been influenced by the government's sentencing memorandum is
13 simply "irrelevant." *Morales Heredia*, 768 F.3d at 1235 (quoting *Camarillo-Tello*, 236 F.3d at
14 1028; *accord Santobello*, 404 U.S. at 262; *Gunn v. Ignacio*, 263 F.3d 965, 969-70 (9th Cir.
15 2001).
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18 In this case, trial counsel objected to the government's motion as conceded by the
19 government. See Dckt. 100 at 8:20-24. However, trial counsel failed to request specific
20 performance of the plea agreement and transfer to a new judge for sentencing following the
21 government's breach, which was the only suitable remedy under the law. *Morales Heredia*,
22 768 F.3d at 1236. This failure fell under the *Strickland* standard for effective assistance of
23 counsel. In addition, government's concession that "Mares' trial counsel objected to the
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1 government's motion" may be enough to preserve the issue for appeal on the breach alone. *See*
2 Dckt. 100 at 8:20-24.

3 In this case, the prosecution committed what is known as an "implicit breach" of the
4 plea agreement. The government's promise to recommend a particular disposition can be
5 broken either explicitly or implicitly. *Morales Heredia*, 768 F.3d at 1231 (*see United States v.*
6 *Whitney*, 673 F.3d 965, 971 (9th Cir. 2012). The government is under no obligation to make an
7 agreed-upon recommendation "enthusiastically," however it may not superficially abide by its
8 promise to recommend a particular sentence while also making statements that serve no
9 practical purpose but to advocate for a harsher one. *See Whitney*, 673 F.3d at 971; *United States*
10 *v. Mondragon*, 228 F.3d 978, 981 (9th Cir. 2000). That is, the government breaches its bargain
11 with the defendant if it purports to make the promised recommendation while "'winking' at the
12 district court" to impliedly request a different outcome. *United States v. Has No Horses*, 261
13 F.3d 744, 750 (8th Cir. 2001). An implicit breach of the plea agreement occurs if, for example,
14 the government agrees to recommend a sentence at the low end of the applicable Guidelines
15 range, but then makes inflammatory comments about the defendant's past offenses that do not
16 "provide the district judge with any new information or correct factual inaccuracies." *Whitney*,
17 673 F.3d at 971 (quoting *Mondragon*, 228 F.3d at 980).

21 **II. The High Standard of a Complete Duress Defense and Why This Was Not** 22 **Complete Duress or New Information to the Government**

23 The standard for proving duress at trial is extremely high and very few defendants
24 attempt a duress trial defense. However, it is a very common topic discussed by defendants,
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1 particularly in drug cases, and prosecutors, defense attorneys, and judges hear these stories
2 every day in guilty plea cases that proceed smoothly to sentencing. Under 9th Circuit Model
3 Jury Instruction 5.7:

4 A defendant acts under [duress] [coercion] [compulsion] only if at the time of the crime
5 charged:

6 First, there was a present, immediate, or impending threat of death or serious bodily
7 injury to [the defendant] [a family member of the defendant] if the defendant did not
8 [commit] [participate in the commission of] the crime;

9 Second, the defendant had a well-grounded fear that the threat of death or serious bodily
10 injury would be carried out; [and]

11 Third, the defendant had no reasonable opportunity to escape the threatened harm[.]

12 Where most defendants in drug cases fail under this definition is regarding the threat's
13 immediacy and the lack of a reasonable opportunity to escape the harm. For this reason, the
14 U.S. Sentencing Commission created USSG § 5K2.12 Coercion or Duress:

15 If the defendant committed the offense because of serious coercion, blackmail or duress,
16 under circumstances not amounting to a complete defense, the court may depart
17 downward. The extent of the decrease ordinarily should depend on the reasonableness
18 of the defendant's actions, on the proportionality of the defendant's actions to the
19 seriousness of coercion, blackmail, or duress involved, and on the extent to which the
conduct would have been less harmful under the circumstances as the defendant
believed them to be.

20 Mr. Mares did not bring up any information in his sentencing materials that was not
21 already known to the government through discovery, the PSR, and during safety valve. Several
22 times in the PSR the threats are clearly mentioned and state that Mr. Mares discussed the threats
23 during his post-arrest statement, meaning they were in discovery. PSR at 8, para. 30. His co-
24 defendant also mentioned the threats post-arrest. PSR at 6, para. 23. None of the statements
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1 rose to the level of meeting the legal definition of duress which would amount to a complete
2 defense. It was disingenuous to represent to the court that these statements were only brought
3 up in sentencing materials because the government was aware of them previously and still
4 proceeded with the guilty plea. To change course at the last minute and retract its three-level
5 recommendation for acceptance of responsibility constituted a reversible breach of the plea
6 agreement which would require remand to a new judge.
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8 **III. Risk of Serious Deterioration of Health and Care for Others**

9 In addition, the covid-19 virus is still prevalent in this country, and Mr. Mares suffers
10 from diabetes which is a well-known co-morbidity for severe illness and death. PSR at 24,
11 para. 90. Once in a federal prison with shared housing, he will be unable to control his exposure
12 to the virus in the same way as living in his own home. His elderly mother has been hospitalized
13 recently and undergoes dialysis treatment, and Mr. Mares prepares meals for her, provides
14 financial support, and provides transportation to medical appointments. PSR 23 at para. 87. In
15 addition, he also provides the sole financial support for his young minor son. PSR 22 at para.
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19 **IV. Conclusion**

20 Every day in our federal courts defendants make statements which constitute imperfect
21 duress in sentencing materials. They do not suffer the prejudice of having the prosecutor file a
22 motion for them to withdraw the plea and take away their acceptance of responsibility points.
23 The government seems to be confused about the affirmative defense of duress and the intent
24 requirements for a conspiracy conviction, stating, “Mares’ statements in his mitigation video
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1 that “but for” the purported threats, he would not have engaged in the offense clearly negate his
2 intent...” Dckt. 100 at 8:15-17. **The government’s misunderstanding of the law regarding**
3 **duress led to a clear breach of the plea agreement.** That they then reversed course and
4 recommended the three points still amounts to a clear implicit breach as outlined by the caselaw
5 above. The case should have been reassigned to a new judge at that point who was not tainted
6 by the breach. Mr. Mares stands a very high likelihood of success on appeal for those reasons.
7 Mr. Mares should be permitted to fight his appeal while lessening his risk of exposure to covid-
8 19 as a diabetic and care for his extremely ill, elderly mother and minor son.
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10 DATED this 17th day of June, 2022.
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13 */s/ Nicole G. Saperstein*
14 By: _____
15 NICOLE G. SAPERSTEIN
16 CJA COUNSEL FOR MR. MARES
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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies she is a person of such age and discretion as to be competent to serve papers. That on June 17, 2022, she served an electronic copy of the above and foregoing by electronic service (ECF) to the person named below:

Allison Reece, Assistant United States Attorney, 501 Las Vegas Blvd. South, Suite 1100, Las Vegas, Nevada, 89101

/s/ Nicole G. Saperstein
NICOLE G. SAPERSTEIN